IN THE

United States Court of Appeals

for the Fourth Circuit

No. 7851

ENTERPRISE WHEEL AND CAR CORPORATION,
a corporation,
Defendant Below, Appellant,

v.

UNITED STEELWORKERS OF AMERICA,
Plaintiff Below, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

APPENDIX TO BRIEF OF APPELLEE

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TABLE OF CONTENTS

	Page
Complaint	1
Plaintiff's Exhibit A - Agreement	3
Answer	8
First Opinion of District Court	11
Order Compelling Arbitration	[Appellant's Appendix p. 15]
Arbitrator's Decision and Award	17
Plaintiff's Motion for Defendant to Show Cause	24
Answer and Resistance of Defendant to Plaintiff's Motion	26
Order to Show Cause	29
Excerpts from Hearing on Motion to Show Cause	30
Order Enforcing Arbitrator's Award	[Appellant's Appendix p. 2]
Second Opinion of District Court	[Appellant's Appendix p. 3]

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STEELWORKERS OF AMERICA,
Plaintiff,
vs.
ENTERPRISE WHEEL AND CAR CORPORATION,
Defendant.
Civil Action
File No. 895

COMPLAINT

1. Plaintiff is a labor organization representing employees in an industry affecting commerce as defined in 29 United States Code, and defendant is a corporation incorporated

under the laws of the State of West Virginia having a plant of operation at 909 Camden Road, Huntington, West Virginia, and employing members of plaintiff's labor organization, and this action arises under Section 301, Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Sec. 185, as hereinafter more fully appears.

2. On or about April 5, 1956, plaintiff and defendant entered into an agreement in writing, which agreement set forth therein the basic agreements covering rates of pay, hours of work, and working conditions of employment to be observed between the parties, a copy of which is hereto annexed as Exhibit A.

3. In accordance with the provisions of ARTICLE III, ADJUSTMENT OF GRIEVANCES, of said agreement, plaintiff and defendant agreed to settle differences arising between the defendant and the plaintiff, or its members employed by the defendant, as to the meaning and application of the provisions of said agreement, according to a specific procedure, including as the final step in the event the dispute be not satisfactorily settled in accordance with said procedure, submission of the grievance to arbitration.

4. That on or about January 17, 1957, a certain grievance arose between the plaintiff and defendant relating to the discharge of William J. Slone, et als, being employees of defendant and members of the plaintiff labor organization.

5. Pursuant to said agreement, Steps 1, 2, and 3 therein contained were accomplished by the plaintiff and defendant; that the plaintiff in accordanec with the procedure of Step 4 requested of the defendant in writing by letter dated February 17, 1957, arbitration of the grievance which arbitration was by the defendant refused; that subsequently defendant agreed to arbitrate and plaintiff and defendant selected as impartial umpire one Milton H. Schmidt, Atlas Bank Building, Cincinnati 2, Ohio, and the arbitration set for hearing on April 16, 1957, at defendant's office in Huntington, West Virginia.

6. Subsequently, defendant, by letter dated April 6, 1957, advised plaintiff that defendant refused to arbitrate, and although requested by the plaintiff on several occasions thereafter, defendant continued to refuse, and still refuses plaintiff's requests to arbitrate said grievance according to the provisions of its written agreement.

Wherefore plaintiff demands that defendant be required specifically to perform said agreement, particularly that provision known as ARTICLE III, ADJUSTMENT OF GRIEVANCES, that defendant be required specifically to arbitrate in accordance therewith, and plaintiff have judgment against defendant for costs.

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PLAINTIFF'S EXHIBIT A

AGREEMENT

Between

ENTERPRISE WHEEL AND CAR CORPORATION

and the

UNITED STEELWORKERS OF AMERICA

AFL-CIO

PREAMBLE

PARTIES TO AGREEMENT

THIS AGREEMENT, made this 5th day of April, 1956 between the ENTERPRISE WHEEL AND CAR CORPORATION (hereinafter called the "Company") for its

plant located at Huntington, West Virginia (hereinafter called the "Plant") and the UNITED STEELWORKERS OF AMERICA (hereinafter called the "Union").

ARTICLE I. PURPOSE OF THE AGREEMENT

Section 1. It is the intent and purpose of the parties hereto that this Agreement shall promote and improve industrial, labor and economic relations between the Company and the Union; and to set forth herein the basic agreements covering rates of pay, hours of work and working conditions of employment to be observed between the parties.

Section 2. The term "employee" as used in this agreement shall include all production and maintenance workers including watchmen and janitors of the Company at its Huntington, W. Va. plant, and not elsewhere, except office and clerical employees, technical employees, professional employees, guards, and supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect change in the status of employees or effectively recommend such change.

ARTICLE II. RECOGNITION

Section 1. The Company recognizes the Union as the exclusive representative of all the employees of the Company, as defined in Article I—Section 2 hereof, for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

* * * * * * *

ARTICLE III. ADJUSTMENT OF GRIEVANCES

Section 1. Should differences arise between the Company and the Union, or its members employed by the Company, as to the meaning and application of the provisions

of this Agreement, an earnest effort shall be made to settle such differences immediately, in the following manner:

Step 1. Between the employee, either with or without the Shop Steward, and the foreman. If no satisfactory disposition is made, then

(a) The grievance shall be put in writing, in triplicate, on forms furnished by the Union, and signed by the employee. Two (2) copies of the form will be given to the Company, one copy of which will be mailed by the company to the Union at its local address.

(b) Such written grievance shall, within thirty (30) calendar days after the occurrence of the grievance (provided the plant is working), be taken up by the Shop Steward, if requested by the Shop Steward, one member of the Plant Grievance Committee and the Plant Manager shall return his answer, in writing, within two (2) working days to the Shop Steward. If no satisfactory disposition is made, then

In case any grievance is carried beyond Step 2. (b), written minutes of all meetings held in connection with it shall be prepared in triplicate, two (2) copies of which will be retained by the Company, and one (1) copy delivered to the Union. These minutes shall be approved and signed by the parties hereto.

Step 2. Between the Plant Grievance Committee and the Plant Manager. If no satisfactory disposition is made within two (2) work days, then

Step 3. Between the representative of the National Organization of the Union and the President of the Company along with the Grievance Committee.

Step 4. In the event that the dispute shall not have been satisfactorily settled in accordance with the above, it shall be submitted, at the request of either party, to a panel of three (3) members, one of whom shall be appointed by

the Union, one by the Company, and the third member, who shall be an impartial umpire, shall be selected by mutual agreement of the parties. The expenses and salary incident to the services of the umpire shall be paid jointly by the Union and the Company. In the event that a mutually agreeable umpire cannot be selected within ten (10) days after date of notice of desire to appeal to 4th step grievance, either party may request the Federal Mediation and Conciliation Service to furnish the Company and the Union with a list of five (5) qualified and disinterested arbiters. The Company and the Union shall each reject two of the names thus submitted and the remaining person (or either of the remaining persons) shall be the third member of the panel. The decision of the umpire shall be final and binding on the parties.

Section 2. Upon request of the Union or the Company, the aggrieved employee, or employees, and the foreman involved will be called in during the meeting on Step 3 grievances.

Section 3. Meetings held in connection with Steps 2, 3, and 4, of Article III—Section 1, Adjustment of Grievances, shall be held after working hours on a date mutually agreed to by the parties.

Section 4. *Conferences called by the Company* with representatives of the Union shall be held during the regular working hours of such representatives, and such conferences shall not result in any loss of time to such representatives.

Section 5. The Company and the Union agree that they will cooperate fully in an effort to achieve maximum production. It is further agreed that the cooperation of all employees is necessary toward increased and improved productivity, toward the effective use of man power and equipment, and toward improved manufacturing methods, and consequently pledge their cooperation toward these objectives.

Section 6. It is understood and agreed that neither party will institute *civil suits or legal proceedings* against the other for alleged violation of any of the provisions of this labor contract; instead all disputes will be settled in the manner outlined in this Article III—Adjustment of Grievances.

ARTICLE IV. SUSPENSION AND DISCHARGE.

[see Appellant's Appendix, pp. 17-18]

* * * * * * *

ARTICLE V. REPRESENTATION

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ARTICLE VI. SENIORITY

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ARTICLE VII. WAGES

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ARTICLE VIII. MANAGEMENT

* * * * * * *

ARTICLE IX. MILITARY SERVICE

* * * * * * *

ARTICLE X. BONUS

* * * * * * *

ARTICLE XI. HOURS OF WORK AND OVERTIME

* * * * * * *

ARTICLE XII. SAFETY AND HEALTH

* * * * * * *

ARTICLE XIII. BULLETIN BOARD

* * * * * * *

ARTICLE XIV. GROUP INSURANCE

* * * * * * *

ARTICLE XV. DURATION AND RENEWAL

[see Appellant's Appendix p. 18]

ENTERPRISE WHEEL AND CAR CORPORATION
A. O. Kraehenbuhl
NEGOTIATING COMMITTEE
Local Union No. 4513
Pearl Skeems
Orlem Banks
UNITED STEELWORKERS OF AMERICA
David J. McDonald
Howard R. Hague
I. W. Abel
Paul Rusen
J. C. Carroll
Harold Johnson

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER

1. For answer to paragraph 1 of the plaintiff's bill of complaint the defendant admits that the plaintiff is a labor organization and that the defendant is a corporation incorporated under the laws of the State of West Virginia, having a place of operation at 909 Camden Road, Huntington, West Virginia, but has no knowledge whether it is employing members of the plaintiff's labor organization, nor has it made any inquiry to ascertain whether it is employing members of the plaintiff's labor organization.

2. Defendant admits the allegations contained in paragraph 2 of the plaintiff's bill of complaint and in further answer says that the contract entered into on April 5, 1956, expired at midnight, April 4, 1957; and further states that

since midnight, April 4, 1957, there has not been in existence a contract between the plaintiff and the defendant.

3. Defendant admits the allegations contained in paragraph 3 of the plaintiff's bill of complaint.

4. In answer to paragraph 4 of the plaintiff's bill of complaint the defendant denies that it discharged William J. Slone, et als, and for further explanation the defendant says that on or about January 17, 1957, the said William J. Slone, et als, went out on a wildcat strike in violation of the contract then existing between the plaintiff and the defendant, and that these men, in violation of the contract, quit their work during the work day, and the company refuses to reemploy them. This is the basis for the alleged grievances here involved. The defendant denies there ever existed a controversy between the plaintiff and the defendant as the plaintiff has, at all times, admitted said William J. Slone, et als, violated their contract by going out on a wildcat strike.

5. For answer to paragraph 5 of the plaintiff's bill of complaint the defendant denies that the steps provided for in the grievance procedure were followed except these alleged grievances were discussed between the complainants, and a representative of the plaintiff's national organization, and the president of the defendant company. The defendant admits receiving plaintiff's letter of February 17, 1957, and of refusing to arbitrate these alleged differences. Defendant further admits that subsequently it agreed to follow the grievance procedure provided for in the contract, and Milton H. Schmidt was selected as the arbitrator and the arbitration hearing was set for April 16, 1957, and that prior to the date set for hearing the arbitration proceedings, plaintiff failed to carry out an agreement it made with the defendant and for this reason the defendant refused to arbitrate these alleged grievances and for reason therefor, see the defendant's letter of April 6, 1957, to the plaintiff, copy of which letter is hereto annexed and made a part hereof at Exhibit A.

6. The defendant admits the allegation contained in paragraph 6 of the plaintiff's bill of complaint and for explanation thereto refers to paragraph 5 herein.

7. For further answer to said plaintiff's bill of complaint the defendant says that this Court is without jurisdiction to try the case, as the jurisdiction herein is vested with the National Labor Relations Board, and that on July 3, 1957, this plaintiff filed a charge against the defendant with the National Labor Relations Board, involving the matters in controversy here involved, copy of which charge is hereto annexed and made a part hereof as Exhibit B.

8. That the National Labor Relations Board, as a result of its investigation, refused to issue a complaint in this matter, as is disclosed by a copy of the National Labor Relations Board's decision of August 12, 1957, a copy of which is hereto annexed and made a part hereof, and marked as Exhibit C.

The defendant further says that the plaintiff has not exhausted its administrative remedies and that no request was filed for a review of the Board's decision of August 12, 1957.

9. The defendant further says that the questions before the Court are now moot. Had these alleged grievances been submitted to arbitration on the day the alleged grievances occurred, the decision of the arbitrator would be binding only during the life of the contract, which expired at midnight, April 4, 1957. Therefore, the question has now become moot.

ENTERPRISE WHEEL AND CAR CORPORATION

/s/ E. A. MARSHALL
of Counsel
Post Office Box 468
Huntington 8, West Virginia

FITZPATRICK, MARSHALL, HUDDLESTON & BOLEN
Counsel for Defendant

Defendant demands a jury trial.

ENTERPRISE WHEEL AND CAR CORPORATION

/s/ E. A. MARSHALL
of Counsel

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

Transcript of an excerpt from the proceedings held in re the above styled action in the United States District Court for the Southern District of West Virginia * * *

[Harry E. Watkins, District Judge:]

This is an action brought under Section 301 of the Labor Management Act, commonly known as the Taft-Hartley Act, in which the union—the Steelworkers Union—seeks to compel specific performance by the employer of a grievance arbitration provision in their collective bargaining agreement.

The contract between the union and the company was filed as an exhibit with the complaint, and when you look to that contract it shows that it covers a specific period beginning April 5, 1956 to midnight of April 4, 1957, and it contains also the common or conventional four-step procedure for resolving grievance disputes between the union on the one hand, representing the employees, and the company. By the terms of that agreement differences or grievances are to be settled by arbitration—let's say step number 4—they are to be settled by arbitration if they cannot be settled by the three lower steps, the three lower steps being agreement on the national level and agreement between the parties on the local level, and if they exhaust all of those and can't settle it, then upon the request of either side they must go to arbitration.

The complaint alleges that a dispute arose on January 17, 1957 relating to—as the complaint says—"to the discharge of some ten employees who were members of the union"—and it alleges that the employer has refused to arbitrate under the fourth step in resolving differences in the labor agreement.

The union does not ask for damages, but only prays that the employer be required by this court to arbitrate the grievance under the contract.

The pleadings, the exhibits, the affidavits, and what has been said here on the record in open court show that while this contract was in force and effect there was a dispute or a grievance relating to an employee by the name of Medley because of unauthorized absences. Certain members of the union's grievance committee took the matter up with the plant manager, and as a result of what happened ten men either quit work, as the defendant says—"went out on a wildcat strike"—or they were discharged as the plaintiff contends.

A grievance was filed in accordance with the collective bargaining contract and was processed through these first three lower steps, all without any success, let us say, or if they were not, if they didn't proceed under the three lower steps, the employer, the defendant, has admitted that procedure under these three lower steps was waived. That is brought out in a letter written by Mr. Marshall as counsel for the defendant to the union. The employer refused to arbitrate the matter according to Step 4 of the contract, and as a result this suit to require the employer to arbitrate under the provisions of the contract was instituted.

The employer's answer denies, first, that a difference or a grievance exists between these parties, but the affidavits which have been filed by both sides and what has been said here in open court clearly indicates that there is a difference, a dispute, existing as to whether these ten employees quit their job or whether they were unlawfully discharged. This

Court has no right to decide that matter; it has no jurisdiction to do so. It does, however, have the right to require specific performance providing there is a difference between the parties or grievances between the parties arising under this labor agreement between them.

That contract provides in Article 3, Section 1, as follows:

"Should differences arise between the company and the union or its members employed by the company as to the meaning and application of the provisions of this agreement, an earnest effort shall be made to settle such differences immediately in the following manner * *"—and then it goes ahead and sets forth the three steps of a preliminary nature, and then if they fail, upon the application of either side, at the request of either side, the matter shall go to arbitration. I think what they do—each side names an arbitrator, and if they cannot agree then they get the list on the third, they get names of five persons from a Mediation Board and each side strikes two, and the fifth, I believe, is the third arbitrator. Is that the procedure? I think it is. At any rate the fourth step in this matter of arbitration upon request of either side.

Article 4 specifically provides that the discharge of employees is a matter which is subject to this grievance procedure, so that the dispute here concerns one of these alleged differences or grievances under the labor contract.

The plaintiff union is recognized in Article 2 of the agreement to be the exclusive representative of all employees in the plant with certain exceptions which are not at all pertinent here.

The exhibits filed with the pleadings indicate that on July 3, 1957 the union filed with the National Labor Relations Board a charge complaining of an unfair labor practice under Section 8(a)(1), 8(a)(3), and 8(a)(5), of the Taft-Hartley Act alleging the employer had refused to bargain collectively with the union since April 6, 1957. The regional office of the National Labor Relations Board re-

fused by letter dated August 12, 1957 to issue a complaint in this case for the reason that in its opinion there was not sufficient evidence of violations to warrant further proceedings. The union admittedly did not seek a review of that decision as provided by the rules and regulations of the National Labor Relations Board, and the employer here, the defendant, now urges in this action that because of that fact, because of the fact that no appeal was taken the union has failed to exhaust its administrative remedies. There is no merit to this contention, however, as the matter before the National Labor Relations Board concerned an entirely different dispute between these parties. The charge filed before the Board concerned the employer's alleged refusal to bargain collectively for a new contract after the expiration date of the contract upon which the action before this court was brought. But that isn't the only reason. Furthermore, the relief sought in this court, there is no administrative remedy provided by the Taft-Hartley Act. This was pointed out by Mr. Justice Frankfurter in the case of the Employees of Westinghouse Corporation, 348 U.S., Employees against Westinghouse Corporation, reported in 348 U.S. 437, at page 443, and 444, in discussing the Taft-Hartley Act, and I quote:

"It is significant, however, that breach of contract is not an unfair labor practice. A proposal to that end was contained in the Senate bill but was deleted in conference with the observation 'once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' "

The defendants further aver that this Court is without jurisdiction in this case and urges that jurisdiction is exclusively vested in the National Labor Relations Board. The Supreme Court has ruled otherwise in three recent cases decided June 3, 1957. Textile Workers Union of America vs. Lincoln Mills of Alabama, 353 U.S. 448; 77 Supreme

Court 912; General Electric Company against Local 205, United Electrical, Radio and Machine Workers of America, 353, U.S. 545, 77 Supreme Court 921; Goodall-Sanford, Inc., against United Textile Workers of America, A.F.O.L. Local 180, 383 U. S. 350, 77 Supreme Court 920. These three cases hold that United States District Courts do have jurisdiction to decree specific performance of an agreement to arbitrate grievance disputes contained in collective bargaining agreements by virtue of the statute under which this action is brought. The General Electric case involved a grievance as here, that an employee had been wrongfully discharged.

Defendant's last defense is that the question before the Court is moot, the contract having expired April 4, 1957. Article 4, Section 1, of the Collective Bargaining contract reads as follows: "Should it be determined by the complaint or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provision of this agreement, the company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost."

Under that section, if an arbitrator should determine, after it hears the case in arbitration, should the decision be that the employer violated this contract in January of 1957 when it discharged these ten or eleven men, then the employer is liable for back pay to those men for the time lost, and this same question of mootness was decided by the Supreme Court in this Lincoln case decided in June of this year. In the Lincoln case that same question of mootness was raised because it was there urged also that the mill had terminated its operation and all work had ceased, but the Supreme Court took cognizance that some of the grievances concerned back pay and stated "Insofar as the grievances of the restoration of work loads and job assignments, the case is of course moot, but to the extent that they sought a monetary award the case is a continuing controversy."

The pleadings and affidavits in this case make it clear that there is no genuine issue as to any material fact in this case. During the period a collective bargaining agreement was in effect between these parties, a bona fide grievance or a difference—and the word "difference" is the language that I just read to you that is in the contract—arose, and there can't be any doubt when you read these affidavits and see what was said here in court yesterday and was said here again today, there can't be any doubt that there is a difference of view as to whether this man was discharged or whether he quit and went out on strike. I don't know; I am not attempting to rule which one is right, but it is a matter relating to the question of discharge of employee. The contract which was signed by both of these parties—the union on the one hand and the employer on the other—said that matters relating to discharge shall go through this effort to settle their differences by these different steps—1, 2 and 3. The employer recognized that there was a grievance and a difference back there months ago because the employer did go through steps 1, 2 and 3 under the provisions of the contract and in one of the letters written by Mr. Marshall to the union, at the very head of the letter, this letter is written to Harold Johnson by Mr. Marshall for the defendant under date of April 6, 1957, and what is the letter about? Well, Mr. Marshall points out right at the beginning of the letter—in regard what? The grievance issue of William J. Sloan, Richard C. Campbell, and so forth—discharge.

And then, in that same letter, he says in effect that Steps 1, 2 and 3 have either been waived or that has been complied with, so therefore there was no question back there a long time ago that this was a grievance or a difference or a dispute over discharge which is covered by this contract and which the contract says that it, upon the request of either party, shall be decided by arbitration.

The Supreme Court says that it is the duty of the Federal

Court, where there is such a provision in a contract, and one side does not agree to submit to arbitration, it is the duty of the court to enforce that arbitration agreement, and/or duty of the court to require specific performance of that labor contract which in effect requires arbitration.

As I said there is a bona fide grievance or dispute as to whether these men were wrongfully discharged or whether they quit to go out on strike. The first three steps of the grievance procedure as provided for in the contract were either carried out or waived. The plaintiff union is entitled to have the employer defendant specifically perform the fourth step of the contract—arbitration.

Therefore, the plaintiff's motion for summary judgment is granted and I will ask you to prepare an order to that effect. Prepare it while counsel is here in town and submit it to me and I will sign it.

That is all.

ORDER OF OCTOBER 21, 1957 COMPELLING ARBITRATION

[see Appellant's Appendix, p.]

* * * *

In the Matter of Arbitration

Between:

ENTERPRISE WHEEL AND CAR CORPORATION
Huntington, West Virginia

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO
Local Union No. 4513

Decision and Award of Arbitrator, Milton H. Schmidt

This case was heard by the Arbitrator at the Company plant at Huntington, West Virginia. The parties waived the contract provision for an arbitration board of three members and agreed to submit the matter to the undersigned as the sole arbitrator.

THE GRIEVANCE AND ISSUE

This grievance, filed by eleven employees on January 23, 1957, challenges the action of the Company in discharging them on January 18, 1957. It is claimed that the discharge was without good cause and was not procedurally proper in that the grievants were not first suspended as required by Article IV of the Agreement. Reinstatement with retroactive compensation for all lost pay is requested.

Hearing of the grievance was delayed pending determination by the United States District Court for the Southern District of West Virginia of the enforceability of the arbitration provisions of the agreement, the Company having refused to arbitrate on the claim that the Arbitration Agreement was not enforceable under the West Virginia law. The Court ruled that the arbitration clause was valid and specifically enforceable, relying upon the recent decisions of the United States Supreme Court in *Textile Workers of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448; *General Electric Company* vs. *Local 205, United Electrical, Radio and Machine Workers of America;* 353 U.S. 545; and *Goodall Sanford, Inc.* vs. *United Textile Workers of America,* 353 U.S. 350.

The Company asserts that the grievants quit their employment voluntarily by participating in an unlawful and unauthorized strike; that in any event, even if the termination could be considered a discharge, it was for good cause; and finally that the grievance is moot since the Agreement between the Company and the Union expired by its terms on April 4, 1957.

FACTS AND DECISION

The parties entered into a Collective Bargaining Agreement on April 5, 1956, to continue until midnight, April 4, 1957. No agreement has been entered into by the parties since the latter date.

Article III of the Agreement provided for the settlement

of disputes by the usual four-step grievance procedure with final arbitration of unresolved grievances.

Article IV, Section 1, provided that no employee would be peremptorily discharged, but that in all cases where management determined that an employee's conduct justified discharge, he would first be suspended for not more than five days, with a right to a hearing, during the five day period, on the question of the propriety of the suspension and whether it should be modified or converted into discharge.

This section further provides in part:

> "Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for time lost."

The Company had fifty-three employees in December, 1956, and fifty-two employees in January, 1957, within the bargaining unit.

On January 17, 1957, a committee of the Union came to the office of the President and Manager of the Company to protest the action of the Company in discharging an employee, Medley, for alleged repeated absences. This meeting took place about 12:30 P.M., during the lunch hour.

The President stated that he would not alter his previous decision concerning Medley, and that, if the Union considered the action improper, a grievance could be filed. There is some evidence that members of the committee rejected this suggestion. It is claimed that some members of the committee stated, in substance, "We have a better way of handling that" (Tr. 37, 75) but this statement is denied by the Union witnesses who were present at the meeting (Tr. 66, 67, 73).

After a few minutes discussion the men left the office and

returned to the plant. About 1 P.M. the President, Mr. Kraehenbuhl, went into the plant and the eleven grievants were congregated in the washroom discussing the subject of their prior conference. After answering a telephone call the President returned and told the men either to go back to work or to ring out and go outside and figure it out (Tr. 77). Thereupon the eleven employees punched out their time cards and walked outside.

The President stated that at that time he had made no decision to terminate the employment of these men (Tr. 44, 45).

Upon leaving the plant one of the grievants called the Staff Representative and told him about the situation. The Staff Representative advised them to return to the plant and inform the President that they would file a grievance on the Medley matter and return to work.

Shortly thereafter, that is about 30 to 35 minutes after leaving the plant, the grievants went back to the President's office, told him that they had conferred by telephone with the Staff Representative and that they had decided to submit the Medley dispute to the grievance procedure.

The President testified:

> "They wanted to know whether they could come back to work and I said 'No, not with Medley'. Medley couldn't come back. They said 'How about if we keep Medley out, can the rest of us come back in the morning?' And I said 'Yes'. And so they left . . ." (Tr. 45).

The President then, within five minutes, called the Company attorney to tell him what had happened. The attorney advised him that he was under no obligation to take the men back since they had quit their jobs. The President then went into the plant and informed the President of the Union that the eleven men who had gone out "would not be permitted to return at the present time." (Tr. 46).

The Union President, who was laid off at the time of the hearing, did not testify. One of the grievants, Insco, testi-

fied that the Union President did not advise the men that the previous understanding that they were to return to work the following day had been cancelled (Tr. 53, 54).

The following morning, January 18, as the men reported to work they found that their time cards had been removed from the rack. The President of the Company who was in the clock house, told them they "didn't have any job there anymore until this thing was settled one way or the other." (Tr. 53). They were ordered off the property.

The grievants then picketed the plant from January 21 to January 25. The evidence is not clear as to whether they carried picket signs or banners. Other employees respecting the picket line did not report for work during that week (Tr. 41).

The Company introduced evidence that about a month previous to the instance covered by this grievance, there had been a wildcat or unauthorized strike for two days in which most of the grievants and some other employees joined. The men, however, returned to work and no disciplinary action was taken against them.

The men were not expressly told at any time that they were discharged, nor did they receive a preliminary suspension notice.

These facts present the question whether the grievants voluntarily quit their jobs, or, in the alternative, whether their employment was properly terminated for good cause.

The evidence is clear that the men were not discharged when they first left the plant. They were told by the President either to go back to work or ring out and go outside and discuss their problem. He did not consider or state to the men at that time that if they left the plant their act of leaving would be construed as quitting their jobs. Upon their return within a half hour, the President admittedly told them they could return to work the following day. No penalty was suggested or inferred. Presumably the matter was settled at this point. The men left the premises with

the assurance of the President that their jobs were not in jeopardy.

Under these circumstances I am unable to conclude from the evidence that the men had quit their jobs. Or, if their previous leaving could be construed as an intention to quit, then the Company through the President, had excused this brief walk-out by agreeing that they should return to work the following day.

The President, after this agreement, changed his mind upon advice of his counsel, and informed the President of the Union that the men would not be taken back. This second decision was carried out the following day by excluding the men who reported for work from the plant. I interpret these facts to constitute discharge of the grievants.

The grievants were in error in not immediately filing a grievance in the Medley dispute matter, rather than taking the action they did.

As soon as they checked with the Union Staff Representative they corrected their previous mistake and promptly informed Management that they would process the Medley dispute under grievance procedure. As a compromise and settlement of the problem Management agreed to permit them to continue their jobs and directed them to report for work the next morning.

Under these circumstances, it is my judgment that the penalty of discharge was not justified. In any event, the contractual obligation of the Company to suspend prior to discharge was ignored. The walk-out of December 6, 1956, cannot justify the action taken on January 18, since that event was past history and waived by the Company. At least it was not asserted as a justifiable basis or ground for the termination of employment.

The action of the men should not be condoned, despite the first decision of Management to have them return to work without penalty. At most, however, the facts warrant the imposition of a disciplinary penalty of suspension of ten days for each of the grievants.

I cannot agree with the Company's contention that this grievance is moot since the Agreement terminated on April 4, 1957, and no new Agreement has been entered into. Not only was the Agreement effective during and for several months after the grievance arose, but, even after that, the Union continued as the representative and collective bargaining agent for the grievants and all other employees in the unit. Their status as employees continued, during the subsequent period of negotiations for contract renewal. They were protected by the law from improper discrimination or termination of their employment without good cause. Their grievance presented a continuing controversy as to rights of employment reinstatement and back pay.

Article IV of the Agreement imposes an unconditional obligation on the Company to compensate an employee wrongfully discharged or suspended for time lost.

The decision of the Regional Director of the N.L.R.B. refusing to issue a complaint on the charge of the Union that the Company had committed unfair labor practices in violation of Section 8 of the National Labor Relations Act involved different issues than those raised here. This action is therefore no bar to the arbitration of this grievance.

In view of the foregoing, therefore, it is my judgment that the grievants were discharged without good or proper cause; that the discharge be reduced to a suspension for ten days for each of the grievants; that they be reinstated to their former status of employees; that they be compensated for such time as they would have worked, less the suspension period and less such sums as each may have received from other employment.

AWARD

The grievance is allowed as follows:

1. The discharge of each of the grievants which occurred on January 18, 1957, is set aside and reduced to a disciplinary penalty of ten days suspension for each of the grievants.

The ten day period is to be calculated from January 18, 1957.

2. The Company shall reinstate each of the grievants who desire reinstatement to the status of employees with their classifications and seniority status as of the date of their discharge, January 18, 1957.

3. The Company shall reimburse the grievants for all time actually lost from work which they would otherwise have had from the Company at the regular rate of pay for each grievant, less the ten day suspension period and less such amounts as each has received for other employment since ten days after January 18, 1957.

/s/ MILTON H. SCHMIDT

April 10, 1958

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

PLAINTIFF'S MOTION FOR DEFENDANT TO SHOW CAUSE

1. Plaintiff says that by order entered herein on October 21, 1957, defendant was ordered to commence specific performance of Step Four of Article III of the Agreement between Enterprise Wheel and Car Corporation and the United Steelworkers of America, dated April 4, 1956, and to expeditiously proceed with the procedure therein set forth.

2. That thereafter, pursuant to said order, the grievance involved was submitted by the defendant and plaintiff to one Milton H. Schmidt for arbitration, and that decision and award issued thereon, a copy of which Arbitrator's decision and award is hereto annexed and marked as Exhibit A.

3. That defendant has failed and refuses to comply with

the Arbitrator's decision and award to reinstate as employees said grievant members of plaintiff labor organization, and has failed and refuses to reimburse said grievant members for all time actually lost from work which they would otherwise have had from defendant.

4. That said Article III of said agreement provides that said award shall be binding on the parties thereto; that upon said decision and award the reinstatement to employment of grievant members of plaintiff labor organization and the payment thereto of wages actually lost as aforesaid, became, was, and still continues, a subsisting duty and obligation of defendant and a subject for compliance pursuant to the direction of said order.

WHEREFORE plaintiff moves the Court for an order directing defendant to show cause, if any it can, why it has not complied with the decision and award of the Arbitrator and reinstate to the status of employees the grievant members of plaintiff labor organization, and to reimburse said grievant members for all time actually lost from work which they would otherwise have had from the defendant, all on the terms contained in said award, and if no good cause be shown, for such further order pursuant to Rule 70 of the Rules of Civil Procedure in aid of the enforcement of said Order of October 21, 1957, and as the nature of the case may require.

JAMES P. CLOWES
Attorney for Plaintiff
207 Riley Law Building
Wheeling, West Virginia

CARNEY M. LAYNE
Attorney for Plaintiff
Inland Mutual Insurance Building
1017 Sixth Avenue
Huntington, West Virginia

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER AND RESISTANCE OF DEFENDANT TO PLAINTIFF'S MOTION FOR DEFENDANT TO SHOW CAUSE

I

The defendant for answer and resistance to the plaintiff's motion to show cause alleges and asserts the following jurisdictional defenses:

First Jurisdictional Defense

The Court lacks jurisdiction over the subject matter for the reason that plaintiff seeks to enforce an arbitration award personal to individual grievants.

Second Jurisdictional Defense

The Court lacks jurisdiction to issue a show cause order in this action to enforce the award of the arbitrator because this action was concluded and finalized when the final order of October 21, 1957, ordering resort to the arbitration procedure of the contract of April 5, 1956, was complied with by submission of the grievances involved to arbitration; the plaintiff's motion for a show cause order being in actuality a new, separate and distinct action to enforce the award of the arbitrator.

In the alternative, should the Court deny the jurisdictional defenses set forth above, the defendant for further answer and resistance to the plaintiff's motion to show cause alleges and asserts the following:

1. Defendant admits the allegations contained in para-

graph 1 of the motion to show cause with the exceptions that by the Court order of October 21, 1957, specific performance of Step Four, Article III of the contract was to begin 35 days from October 21, 1957, and that the contract itself was dated April 5, 1956 instead of April 4, 1956, as alleged.

2. For answer to paragraph 2 of the motion to show cause, defendant admits that the grievances ordered by the Court to be arbitrated were submitted by the plaintiff and defendant to Milton H. Schmidt for arbitration under the terms and conditions of the contract of April 5, 1956; that hearing was held before said arbitrator on January 3, 1958; that on April 10, 1958, he rendered what is denominated "Decision and Award of Arbitrator, Milton H. Schmidt", a copy of which plaintiff has attached to its motion as its "Exhibit A."

3. For answer to paragraph 3 of the motion for defendant to show cause, defendant admits that it has not complied with the "decision and award" of the arbitrator for the reason that said "decision and award" is illegal, improper, invalid and void and defendant alleges that this is so because of the following:

(a) the arbitrator exceeded the powers vested in him as arbitrator under the terms, provisions, and limitations set forth in the contract entered into on April 5, 1956, expiring on April 4, 1957, and the arbitrator without authority amended, modified and enlarged upon the provisions of said contract and agreement;

(b) the arbitrator by his award so imperfectly executed the duties and responsibilities placed upon him that a final and definite award upon the subject matter submitted was not made;

(c) the arbitration award was not in accordance with law.

For further answer to paragraph 3 of the motion for defendant to show cause, defendant alleges that the contract

under which arbitration was had expired and terminated on April 4, 1957; that since that date all the employees of defendant have worked without any contract whatsoever and the terms, conditions and rights of the terminated contract were not extended to them, but this notwithstanding, the award of the arbitrator would apparently grant reinstatement of the grievants and back pay at their regular rates less amounts each received for other employment not only from ten days after January 18, 1957 (this ten-day period embracing a suspension period meted by the arbitrator) to April 4, 1957, but ad infinitum. However, the illegal, improper, invalid and void award of the arbitrator notwithstanding, defendant while refusing to reinstate the grievants did nevertheless offer to pay the grievants at their regular rate of pay for their actual losses from the end of the ten-day suspension period to April 4, 1957, the expiration date of the contract, but said offer was refused.

4. For answer to paragraph 4 of the motion for defendant to show cause, defendant denies that the award of the arbitrator is binding on it and denies each and every other allegation of said paragraph.

WHEREFORE, defendant prays that the Court deny the motion of the plaintiff for defendant to show cause because of lack of jurisdiction to consider same, or in the alternative, should the court determine it has jurisdiction to consider the motion to show cause, defendant prays, without waiver of right to except to the ruling on said jurisdictional question, that the Court vacate the award of the arbitrator dated April 10, 1958.

ENTERPRISE WHEEL AND CAR CORPORATION

/s/ WILLIAM C. BEATTY

/s/ E. JACKSON BOGGS

of Counsel

FITZPATRICK, MARSHALL, HUDDLESTON & BOLEN

Counsel for Defendant

P. O. Box 468 Huntington, West Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ORDER

On the 11th day of December, 1958, came the plaintiff by James P. Clowes and Carney M. Layne, its counsel, and came the defendant by William C. Beatty and E. Jackson Boggs, its counsel, and this matter came on to be heard on the plaintiff's motion for defendant to show cause and the defendant's answer and resistance thereto, and the affidavit of Oscar Kraehenbuehl in support of said answer and resistance; upon consideration of which the Court does hereby ADJUDGE AND ORDER the defendant to show cause in conformity with plaintiff's motion, to which action of the Court the defendant, by counsel, objected on the grounds of the lack of jurisdiction of this Court as set forth in its answer and resistance; whereupon defendant asked leave that its answer and resistance to said motion to show cause and the affidavit of Oscar Kraehenbuehl in support of said answer and resistance be taken and treated as its answer to the Court's order to show cause; and there being no objection thereto, and the Court perceiving none, said leave is granted and defendant's answer and resistance to said motion and affidavit of Oscar Kraehenbuehl in support thereof is ORDERED to be, and is hereby, taken and treated as defendant's answer to the said order of the Court to show cause.

Thereupon by agreement of the parties the matter came on for hearing on plaintiff's motion to show cause, the order of the Court for the defendant to show cause in conformity with said motion, the defendant's answer and resistance thereto, and the Affidavit of Oscar Kraehenbuehl in support of said answer and resistance, the facts agreed by the parties as shown in the pleadings, exhibits and admissions at the hearing made by the parties in open court, and the matter

proceeded to final hearing on the showing of cause by defendant, and was submitted by the parties to the Court for final decision.

ENTER: This..... day of December, 1958.

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

Transcript of proceedings had and testimony adduced at a hearing in re the above-styled action in the United States District Court for the Southern District of West Virginia, held in the United States Post Office and Courthouse Building in the City of Huntington, West Virginia, on the 11th day of December, 1958, BEFORE:

THE HONORABLE HARRY E. WATKINS,
Judge of the United States District Court
for the Northern and Southern Districts
of West Virginia.

* * * * * *

Pages 3-5:

THE COURT:

. . . . Now, I want to ask counsel for the defendant first if there is anything in the motion to show cause in the way of facts that are denied? I don't recall from reading the briefs here whether there are any facts set forth in the motion to show cause that are denied. You rely—your defense is on matters of law. You admit that the award was made; it was filed; and therefore you asked the Court to look at the award and look at the—contract is also in evidence, is it not?

MR. BEATTY: Yes, sir, it is.

THE COURT: It is in evidence with the original action?

MR. CLOWES: Yes, sir.

THE COURT: We have the contract; the award of the commissioner arbitrating, and then you raise certain legal points relating to that. I don't believe that you deny any facts set forth there. Are there any facts?

MR. BEATTY: No, sir, there are no facts. The only thing we did was allege some additional information that—

THE COURT: Now, first I am going to ask you this question, it is going to be to them, whether or not they dispute any of the facts set up in your answer. My first question to you is whether or not you have denied any of the facts set up in their motion. I think—

MR. BEATTY: No sir, you're entirely correct in saying that we have not.

THE COURT: All right. Therefore I will then ask Mr. Clowes the next question, do you deny any of the facts that are set up in their answer in resistance of defendant to plaintiff's motion for defendant to show cause?

MR. CLOWES: Yes sir, we do deny the statement in the middle of the last paragraph on page 3 that since that time all employees of defendant have worked without any contract whatsoever. We do deny that fact.

THE COURT: Well, now, let's take that. Is that a matter also of construction or is it a matter of fact, that since then all employees have worked without any contract whatsoever, and the terms, conditions and rights of the contract were not extended to them, and you might elaborate on that.

MR. CLOWES: We will stipulate that there was no written contract. There was an agreement entered into with the employees by Kraehenbuhl that the men would continue to—could work under the terms of a negotiated settlement which was in effect, the terms of the old contract, plus wage increase.

Pages 6-10:

THE COURT: Well, why wouldn't it be better to take it up in sequence. You're telling me that sometime earlier there was an oral contract with Mr. Kraehenbuhl. Then you go back and say there was another contract when it was terminated. You get me confused. Let me take them in sequence.

MR. CLOWES: Very well, in chronological order, the old contract expired.

THE COURT: By its terms on April 4, 1957.

MR. CLOWES: By its terms on April 4, 1957. The union bargaining committee or negotiating committee and management—Mr. Marshall and Mr. Johnson, the representatives of the union, came to an agreement for a collective bargaining agreement to extend for a period of two years. The terms of that contract, which was approved by the union membership, incidentally in meeting was that the terms and conditions of the contract which had expired on April 4, 1957 would be extended for a period of two years and that the company would grant wage increases, a certain amount for the first year and an additional amount for the second year. That was agreed upon. Mr. Marshall at that time stated that they would not enter into a contract unless and until the union agreed that it would drop the arbitration which was the subject of this suit. The union and the bargaining committee stated that they could not do so; they had no authority to bargain away the rights of their men, so they went on strike because of no contract. At a later time, when the men were financially pinched, they went to Mr. Johnson, their union representative, and asked if they could go and talk to Mr. Kraehenbuhl about going back to work under the terms of the contract as had been agreed upon previously but which was upset by this arbitration business. Mr. Kraehenbuhl agreed, after consultation presumably with Mr. Marshall, that the men could return to work and would work under the contract as ne-

gotiated, and that is the situation and it has existed up until the present.

THE COURT: Well, they have continued to work?

MR. CLOWES: Yes, sir, and the bonus plans which were in effect under the old contract, the bond purchases which was in the old contract, the grievance procedures in the old contract, the wage increases as has been granted were all performed by the company.

THE COURT: Well, but they had no actual written contract?

MR. CLOWES: No written contract, no sir.

THE COURT: They had been worked, you say, under this negotiated contract.

MR. CLOWES: Yes, sir.

THE COURT: Now, is there a dispute as to those facts?

MR. BEATTY: Yes, sir, I believe there is. We, of course, do not agree that the men have an oral contract as stated by Mr. Clowes here. Now, I have Mr. Kraehenbuhl here and I am willing to put him on and give his testimony to this effect.

THE COURT: And do you have your employees here to hear that matter?

MR. CLOWES: No sir. The situation was this, Your Honor please. They filed, subsequent to the filing of their answer, the affidavit of A. E. Kraehenbuhl in support of their answer. We have prepared a motion to strike that affidavit as being immaterial and impertinent. We also, in the alternative, have the affidavits of two of the negotiating committee to submit to Your Honor in opposition to the affidavit filed by Mr. Kraehenbuhl.

THE COURT: Well, affidavits of neither side are generally proper. The proper way—when you get into court—is to bring witnesses in to testify. I don't want to read affidavits. I want the witnesses to testify.

MR. CLOWES: If Your Honor please, if the Court feels that that particular issue of contract is material we can get

our witnesses in a matter of half an hour or so, but we have taken the position, Your Honor please, that even if no contract at all had existed subsequent to April 4, 1957 this still would not have been any defense on the part of the defendant company.

We have cases which have held that the matter is a continuing controversy which goes beyond the expiration date of the contract. It could be likened to an automobile insurance—liability insurance policy, that would expire say on April 4, 1957 with an accident having occurred in January. The company is still liable for anything which goes beyond the date of that contract, an injured person who would have doctor bills and hospital bills that would go beyond the expiration date of the contract would still be compensated for through the terms of the policy. I think that the Lincoln Mills case is one case in particular. I think we have cited a number of them in our brief which says if it isn't in grievance—even if the company goes out of business entirely it is still a continuing controversy up until the time that it does get out of business.

* * * * * *

Pages 20-24:

THE COURT: Well, you say that no new collective bargaining contract has been negotiated. Well, does the company deny that they did have a meeting and attempt to negotiate and did agree on some provisions, and then the union, as I understand it, they did meet and agree on some —negotiate—try to—on a new contract, and agreed on some things, but then the union people came along and said, no, we can't sign this until this old dispute is also settled, and therefore, there was no—no written contract was really written up and signed. That is true, I understand.

MR. BEATTY: Yes, sir.

THE COURT: What I have just stated, Mr. Beatty?

MR. BEATTY: Mr. Kraebenbuhl agrees with that statement, your honor.

THE COURT: Agrees. Then, later on, as I understand the facts, they say that the union people got hard pressed and they said they wanted to work and they went to their officers to try to see if they couldn't go to work. Is that denied?

MR. BEATTY: Mr. Kraehenbuhl—Your Honor, may I speak off the record because I don't want to testify, but Mr. Kraehenbuhl says his impression is that some of them went to work before that.

MR. CLOWES: That is correct, some of them went to work before this other agreement was reached, while the strike was on.

THE COURT: What I say is true except for the one thing, that some of them did go back earlier before they even talked with their union men?

MR. BEATTY: That is correct, Your Honor.

THE COURT: But anyhow those who went to see the union men and who had not worked, the union people then said, yes, go ahead and go to work and they did go to work.

MR. BEATTY: But without an agreement.

THE COURT: Well, I know, they went ahead and went to work.

MR. BEATTY: Yes, sir.

THE COURT: Now, the only difference is that the union people say that they had an understanding then when they went to work that they were going to work under the unwritten negotiations for a new contract which they had previously discussed and agreed upon. That's what the union people say. Mr. Kraehenbuhl says that there was no such negotiation. Is that true?

MR. BEATTY: That's right, Your Honor.

THE COURT: That they went back to work and nothing was said about them working under the unwritten negotiations that they had previously had, is that correct?

MR. BEATTY: That is correct.

THE COURT: Well, now, we understand each other.

Then let me ask you one other point. Then they say in their affidavit here that the company did give an increase in wages, and the amount of increase in wages was what they had previously talked about in trying to negotiate a new contract.

MR. BEATTY: They did agree upon a wage increase, an informal thing, which Mr. Kraehenbuhl just discussed with employees. It was not in these negotiations that we have been speaking of.

THE COURT: Well, that is my question. They were given an increase.

MR. BEATTY: Yes, but not through these negotiations.

THE COURT: Yes, but was the amount of the increase the same as they had talked about and upon in the negotiations?

MR. KRAEHENBUHL: We never agreed on what was in the negotiations. The agreement was made with the men. They were outside the fence. We made the agreement between them without the union being there.

THE COURT: I understand that. But was the amount of the increase the same as you had talked about and, I understand, had agreed upon for your new contract that was never written up?

MR. KRAEHENBUHL: No, that isn't quite—the whole deal is there was an offer made—

THE COURT: Well, was the amount of the wages when they did come back the same as you had agreed upon in your negotiations?

MR. KRAEHENBUHL: It was a little more; a little higher.

THE COURT: It was more?

MR. KRAEHENBUHL: Yes, than the final offer we made in the negotiations.

THE COURT: Well, I think really with this on the record it seems to me that the affidavit can come in.

MR. BEATTY: Your Honor, I would like to point out—

THE COURT: Without the affidavit of the employees because the affidavit—I see nothing that is in controversy.

MR. CLOWES: Under the circumstances, I think Your Honor is correct. There is nothing in controversy.

THE COURT: And, there isn't anything in this affidavit of Mr. Kraehenbuhl that is different from your position in the matter except this last part.

MR. CLOWES: That is correct.

THE COURT: And I have now brought out in the record what part is admitted as to that.

MR. CLOWES: Yes, sir.

* * * * * *

Pages 31-36:

THE COURT: Well, do you conceive what I have just said, that if a person accepts the discharge and says I never intend to work for them again, I am not asking—I am not seeking reinstatement. I accept the fact that I have been discharged, and so far as reinstatement is concerned, but I do want my damages for lost earnings, then do you not say that his measure of damages would be the difference between the date of his discharge and the date of the termination of the contract? Sometimes if I get your position on one phase, it helps me reason on the other phases.

MR. CLOWES: Well, if Your Honor please, I would think that I would even go further than what Your Honor has stated. I think that his rights accruing to him would continue until such time as the offer is made to him for reinstatement and for back wages. If, on that occasion, he would state that I don't want to go back to work for you or I don't want my back wages, then that would stop right there.

THE COURT: Well, let's advance that date; suppose he tells them right away after he is discharged I am not seeking reinstatement.

MR. CLOWES: Then I think his rights are terminated as of that date. I think if we can use the hypothetical situation that on April 8th he would go to management and say I don't want to work here any more; I don't want any back wages or anything else, I think his rights would be terminated as of that date, in which case he wouldn't be a grievant and have proceeded through on this case.

THE COURT: Let me ask you this, you take the position then that the company's way of getting out of this dilemma is to first reinstate him, the contract is ended, you don't contest the fact that the company could discharge him the day they reinstate him?

MR. CLOWES: No, sir, I do not.

THE COURT: Because there is no contract.

MR. CLOWES: I won't go to that extent. There is no written contract. If they would fire a man for something apart from this particular situation right here after they have reinstated, that is entirely a different matter unrelated to this in any way. They can't discriminate under National Labor Relations Act or cause any wrongful discharge.

THE COURT: Of course, that's a different proposition.

MR. CLOWES: Yes, sir, that's a different proposition.

THE COURT: But certainly the existing contract would have been terminated—I mean the written contract that they had before would certainly be ended and under the provisions of that contract he would have no right to continue, would he

MR. CLOWES: If he didn't fall within the provision of a new contract the company would then have the right to hire, fire and do anything.

THE COURT: That is what I mean.

MR. CLOWES: Yes, sir.

THE COURT: Well, that is your position. Now you folks say, of course, that I have no jurisdiction to hear the case, and I might say that I'm not troubled about that. I

have already taken jurisdiction and I might say that I am going to continue to follow through with this case and render some sort of a decision. I can tell you that part of the decision is going to be that. I want to read all your cases and study your briefs a little bit more on this point—relating to the termination date of the contract and its effect on his reinstatement and his damages—the measure of damages.

You say that the contract ended in April of 1957 and that the most that he can receive is damages up to the termination of that contract?

MR. BEATTY: Yes sir, that is exactly right.

THE COURT: And you say you have already offered to pay these amounts?

MR. BEATTY: Yes, sir we have.

THE COURT: You offered that, I suppose, after the case was started in this court?

MR. BEATTY: After the arbitrator made his award.

THE COURT: And after—and before, I suppose, this motion to show cause?

MR. BEATTY: Yes, sir.

THE COURT: Was ordered?

MR. BEATTY: Yes, sir.

THE COURT: You did that, is it not true, not admitting—you did not admit that he was entitled to anything after the date of discharge—you did that merely as a way of getting rid of the case, as I understand it.

MR. BEATTY: That's right.

THE COURT: You still say that the arbitrator had no authority to do anything?

MR. BEATTY: To do it—in other words to reach the award that he reached; that he exceeded his authorities and our points, as stated, on the law, he went beyond his authority, and his contrariness to the principles of law.

THE COURT: Now, you have made a motion—the plaintiff has—to show cause, and, of course, that is how we get to court here today. I suppose what you're really doing is you're showing cause by reason of what you have set forth in your affidavit, in your answer, and in your briefs.

MR. BEATTY: That is the way I would look at it.

* * * * * *

ORDER ENFORCING THE ARBITRATOR'S AWARD

[See Appellant's Appendix p. 2]

OPINION OF THE DISTRICT COURT

[See Appellant's Appendix p. 3]

[fol. 41] Minute Entry of Argument and Submission—April 16, 1959 (omitted in printing).

[fol. 42]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7851

ENTERPRISE WHEEL AND CAR CORPORATION, Appellant,

versus

UNITED STEELWORKERS OF AMERICA, Appellee.

Appeal From the United States District Court for the Southern District of West Virginia, at Huntington.
Harry E. Watkins, District Judge

Argued April 16, 1959

Before:

Sobeloff, Chief Judge, and Soper and Haynsworth, Circuit Judges.

William C. Beatty (E. Jackson Boggs, and Fitzpatrick, Huddleston, Bolen & Hudgins on brief) for Appellant, and

James P. Clowes and David E. Feller (Carney M. Layne, Arthur J. Goldberg, and Jerry D. Anker on brief) for Appellee.

OPINION—Decided June 16, 1959

Soper, Circuit Judge:

The question in this case is whether the District Court [fol. 43] had power under Sec. 301 of the Labor Manage-